STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2004
v	No. 248039 Muskegon Circuit Court
JOHN FITZGERALD SMITH, Defendant-Appellant.	LC No. 01-046253-FC

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony, MCL 750.227b, felon in possession of a firearm, MCL 750.224f, and carrying a concealed weapon, MCL 750.227. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to terms of fifteen to fifty years for armed robbery, two years prior to and consecutive to the armed robbery sentence for possession of a firearm during the commission of a felony, ten to twenty years for felon in possession of a firearm and ten to twenty years for carrying a concealed weapon. He appeals as of right. We affirm.

Defendant's convictions arise from the December 2, 1999, robbery of the Muskegon Governmental Employees Federal Credit Union that occurred within minutes after it opened. Cassandra Baker, a teller at the credit union, was approached by an African-American man with high cheekbones and a thin mustache. The man was wearing a dark golfer's hat with a Nike logo on the back and a blue and green wind suit jacket. A videotape of the robbery showed that the man appeared to be wearing large-framed glasses. He handed Baker a note, which stated, "this is a sick [sic] up." Baker read the note, looked up, and saw a tarnished gun pointed at her. She provided the man with more than $2,000, including "bait" money, which is money capable of being identified by the credit union. The bait money, two $20 bills and one $10 bill, was clipped together. Baker put the money into the man's brown banker's bag.

A credit union customer chased the robber after he left the credit union. Along the route taken by the robber, the bait money and some single dollar bills were found. A dark golfer's cap with a Nike logo was also recovered from a shed along the route. Defendant's DNA was positively identified in the top lining of the recovered hat. The statistical probability of finding an unrelated individual at random to match defendant's DNA in the hat was 1 in 814 billion for

the Caucasian population, 1 in 22.6 billion for the African-American population, and 1 in 2.8 trillion for the Hispanic population. While mixed DNA was found on threads from the Nike logo of the hat, defendant was not eliminated as a contributor from that mixed DNA.

Shortly after the robbery, defendant was observed by the police and videotaped by a police car camera. He was exiting an alley between Fifth and Sixth Streets in the general area where the robber ran. Defendant was wearing a large orange coat. He went to the home of David Day and asked Day to jump his car. Defendant commented that, if Day had not been outside, the police probably would have picked him up. Defendant's car was parked near the credit union in an area where no businesses were operating. Day went with defendant and jumped the car. Defendant subsequently switched cars with his brother, who owned a brown Oldsmobile Cutlass with custom white stripes.

Kenneth Jones, who lived on Fifth Street, testified that, on the morning of the robbery, a man arrived at his house. Jones saw a brown car with white stripes. The man, who Jones could not or would not identify, wanted to retrieve something from Jones' garbage can. Jones told the police that the man said, "I don't mean to disrespect you. The police were chasing me and I put something in your garbage can."

Baker could not identify the robber, but she later identified the gun used during the robbery, and she identified the jacket worn by the robber. She also identified a brown, vinyl bank bag and a golfer's hat that appeared consistent with those worn by the robber. The jacket, bank bag, and gun were recovered from the home of defendant's girlfriend, Yolanda Brown, in Grand Rapids. Twenty-nine $100 bills were also recovered from Brown's home, along with several of defendant's personal items. After December 2, 1999, defendant made several large purchases. Defendant lied to Brown about where he obtained money in December 1999. He told her that he finally received $2,000 from a prison account. The evidence established, however, that defendant cashed out his prison account in April 1999 and received $19.77. He never had a prison account with a $2,000 balance.

Dimitri Anderson, who knew defendant from childhood, was jailed with him in August 2001. Defendant admitted to Anderson that he robbed the credit union and stated that he parked near the credit union and went inside. He had planned to leave his car running during the robbery, but it stalled. He gave a note to one of the three tellers. The note contained a misspelled word. Defendant used a small, "raggedy ass" gun during the robbery, and he was chased as he left the credit union. He threw away the bait money and dropped some additional money. Defendant subsequently found someone to jump his car. Defendant later used his brother's car to retrieve the money that he ditched at Ken Jones' house.

I

Defendant first argues that the trial court erred in denying his motion to suppress evidence obtained from Brown's house pursuant to a search warrant. Specifically, he challenges the sufficiency of the affidavit supporting the warrant. A search warrant may be issued only on a showing of probable cause supported by oath or affirmation. *People v Nunez,* 242 Mich App 610, 612; 619 NW2d 550 (2000). "Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct could be found in a stated

place to be searched." *Id.*, quoting *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992).

> In assessing a magistrate's determination in regard to probable cause, the search warrant and underlying affidavit must be read in a commonsense and realistic manner, and a reviewing court must pay deference to a magistrate's conclusion that probable cause existed. Such deference requires the reviewing court to determine whether a reasonably cautious person could have concluded that the finding of probable cause had a "substantial basis." [*Nunez, supra* at 612-613 (citation omitted).]

The affidavit must contain facts within the knowledge of the affiant, and the affiant's experience is relevant to the establishment of probable cause. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001).

The affidavit in this case was sufficient to establish probable cause. A reasonably cautious person could conclude from the facts provided that there was a substantial basis for a finding of probable cause. *Nunez, supra* at 613.

The affidavit was based on information gathered in the robbery investigation. The affidavit was sworn to by Mike Ferrier, a detective with twenty-eight years of experience. Ferrier viewed the videotape of the robbery and noted that the basic description given by witnesses matched what appeared on the video. It also matched the description of a robber who committed another credit union robbery in December 1999. There was witness information that defendant wore "personality" glasses, and the robber was wearing glasses in the videotape. Defendant's car was observed parked near the credit union shortly after the crime, in an area with infrequent traffic. An eyewitness observed the robber running from the credit union in the direction where defendant's car was parked. Several single-dollar bills were found on Sixth Street, two houses away from Ken Jones' house on Fifth Street. Defendant and his brother, Jeffrey Smith, switched cars shortly after the robbery. Jeffrey Smith had a brown Cutlass with custom white stripes. Ken Jones later saw a brown car with white stripes on its hood outside of his house. At that time, a man retrieved something from Jones' garbage can. He told Jones that he put something in the can while the police were chasing him. The investigation confirmed that defendant lived at Brown's house in Grand Rapids, the location for the stated search. Ferrier also averred that, in his experience, persons involved in robberies keep the clothing and proceeds of their theft at their place of residence. Because the supporting affidavit provided a substantial basis for the magistrate's finding of probable cause, the trial court did not err in denying defendant's motion to suppress.

In reaching our conclusion, we note that defendant does not argue that there was false or incorrect information in the affidavit. He maintains, however, that the affidavit omitted material information; particularly information that Baker previously identified another suspect and that this other suspect was investigated.

> The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material

was necessary to the finding of probable cause. This standard also applies to material omissions from affidavits. (citations omitted) [*Ulman, supra* at 510.]

Defendant has not met his burden of showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, made a material omission from the affidavit. In fact, the record does not support defendant's claim that the other suspect, Dwight Jones, was positively identified as the robber by Baker or any other witness. Dwight Jones was investigated and cleared as a suspect. We therefore reject defendant's argument that there was a material omission of information from the affidavit.

II

Defendant next argues that the prosecutor should not have been permitted to call Dimitri Anderson as a witness at trial. A prosecutor may add a witness at any time upon leave of the court for good cause shown. MCL 767.40a(4); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). A trial court's decision to allow the late endorsement of a witness is reviewed for an abuse of discretion. *Id.*

On Monday, May 6, 2002, the day before trial began, the prosecutor moved to add Anderson as a witness. The prosecutor informed the trial court that, on the previous Friday, he saw for the first time a police report containing information about Anderson. Anderson was actually interviewed by the police in September 2001. The prosecutor immediately informed defendant of his desire to add Anderson as a witness, and he forwarded the police report to defendant's counsel. At the motion hearing, the prosecutor represented that there would be approximately forty witnesses at trial and that Anderson would not be called early in the trial. The prosecutor agreed to accommodate defendant in interviewing Anderson. Over defendant's objection, the trial court granted the motion and indicated that, if defense counsel interviewed Anderson and wanted a continuance, the trial court would entertain a motion for a continuance. The trial court held that good cause was shown, specifically that the prosecutor was not sandbagging, had just received the report from the police, and was dealing with an enormous volume of police reports and witnesses. We find no abuse of discretion in the trial court's decision to allow the prosecutor to call Anderson as a witness. The prosecutor was unaware of Anderson's identity as a witness until the Friday before trial. The trial court found good cause for adding Anderson, a finding that is not challenged by defendant, and it provided defendant with the opportunity to interview Anderson and to move, if necessary, for a continuance. Defendant did not move for a continuance.

We note that the basis for defendant's argument on appeal is that the prosecutor committed a discovery violation when he failed to provide defendant with the police report related to Anderson. But defendant never objected to the addition of Anderson as a witness on the ground that there was a discovery violation. An objection raised on one ground, here good cause to add the witness, is insufficient to preserve an appellate attack based on a different ground, here an alleged discovery violation. *Id.* Because this issue is not preserved, it is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In order to demonstrate a plain error requiring reversal, an error must have occurred, the error must be clear or obvious, and defendant bears the burden of persuasion that the error

affected the outcome of the lower court proceedings. *Id.* Defendant has failed to support his claim or persuade this Court that there was a plain discovery error that affected the outcome of his trial. And, even if we accepted that there was a plain prejudicial error, reversal is only required where the error resulted in the conviction of an actually innocent defendant or the error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* That standard has not been met in this case.

III

Defendant next argues that he was denied due process by an unduly suggestive identification procedure, which was conducted without the benefit of counsel. He argues that the most incriminating evidence against him was Baker's identification of the gun used in the armed robbery. Baker was allowed to view the evidence collected by the police during their investigation, which was displayed on a table, and was asked if anything looked familiar. This occurred after defendant was in custody. Defendant moved to suppress the evidence of the gun on the ground that its identification occurred under highly suggestive circumstances. He suggests that other guns should have been included on the table when Baker viewed the items. Whether evidentiary objects should be subject to identification procedures similar to those used for human suspects presents a question of law. Questions of law are reviewed de novo. *People v Aguwa*, 245 Mich App 1, 3; 626 NW2d 176 (2001).

In *People v Miller (After Remand)*, 211 Mich App 30, 41; 535 NW2d 518 (1995), this Court held that lineup procedures applicable to human suspects are not applicable to inanimate objects. "[A]ny suggestiveness in the identification of inanimate objects is relevant to the weight, not the admissibility, of the evidence." *Id.* In this case, defendant was not present during the identification. There were numerous objects on a table. Baker was not asked to identify any item in particular but was simply asked if anything looked familiar. Under the circumstances, any suggestiveness in the identification of the gun did not preclude its admissibility.

IV

Defendant additionally argues that the destruction of the gun before trial constitutes error requiring reversal. Because defendant did not raise this issue before the trial court, it is not preserved. Unpreserved allegations of error are reviewed for plain error. *Carines, supra.*

Before trial, the gun was photographed and identified by Baker as being the weapon used by the robber on December 2, 1999. Later, a Michigan State Police detective permitted the firearm to be destroyed in error. The jury was informed about the destruction of the gun, heard Baker's testimony identifying the gun, and was shown a picture of the gun.

"Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993), citing *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988). In *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989), this Court observed that where "the state has failed to preserve evidentiary material of which no more can be said than that it could have been subjected to tests the results

of which might have exonerated the defendant, the failure to preserve the potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the police."

In this case, defendant speculates that if the gun was not destroyed, he could have inspected it or demonstrated that it was not the same weapon observed by Baker during the robbery. It is speculative for defendant to argue that the gun may have assisted his defense. Baker identified the gun before it was destroyed. At trial, she testified that the picture of the weapon admitted into evidence depicted the same weapon she identified at the police station. She was positive that the gun was used in the robbery. Further, the state police detective, who mistakenly agreed to the destruction of the gun, testified that the gun depicted in the photographs was the exact gun that was destroyed. The admission of the gun at trial had the potential of strengthening Baker's testimony, not diminishing it. At most, the gun had speculative exculpatory value. More importantly, however, there was no evidence of bad faith destruction in this case. In fact, defendant conceded in his closing argument that the gun was mistakenly destroyed. Thus, we find no plain error with respect to the destruction of the gun.

We further find no merit to defendant's argument that his counsel was ineffective for failing to request an adverse inference instruction or moving to dismiss the charges based on the destruction of the gun. In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). In arguing that he was denied the effective assistance of counsel, defendant fails to demonstrate or offer any support for his conclusory claim that he was prejudiced by counsel's alleged failures. The burden is on defendant to prove his claim of inadequate representation. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because defendant has not demonstrated that, but for his counsel's alleged errors, there was a reasonable probability of acquittal, his claim fails.

V

Defendant next argues that he was denied his right to a speedy trial. This issue is not preserved because defendant did not formally demand a speedy trial. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Unpreserved allegations of error, constitutional and nonconstitutional, are reviewed for plain error affecting substantial rights. *Carines, supra.*

> A criminal defendant has a constitutional and statutory right to a speedy trial. "In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay." [*People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000) (citations omitted).]

If delay not attributable to the defendant exceeds eighteen months, prejudice is presumed and the prosecutor must show that the defendant was not prejudiced by the delay. *People v Holtzer*, 255 Mich App 478, 493; 660 NW2d 405 (2003). A delay of less than eighteen months requires the

defendant to prove that he suffered prejudice. *Cain, supra* at 112. The length of delay, however, is not determinative of a speedy trial claim. *Id.*

In this case, the length of delay does not favor a finding of a speedy trial violation. Defendant was arrested by the police in February 2000, and was thereafter held on a parole detainer until August 2001. The charges in this case were not formally brought until June 8, 2001, at which time defendant was arrested for the charges. Defendant's trial began on May 7, 2002, less than one year after he was charged. Thus, while defendant was incarcerated for twenty-seven months before his trial, the delay between his arrest on the charges and his trial was less than one year. We note that the length of the delay does not approach the outer limits of delays that have been addressed in other cases. See *Cain, supra* at 112-113. In *Cain,* this Court found that a delay of twenty-seven months did not rise to the level of a constitutional violation. *Id.* at 111-114.

Nor do the reasons for delay weigh in favor of finding a speedy trial violation. The delay between defendant's arrest, after which he was held for a potential parole violation, and his formal arrest on the instant charges is not attributable to either party because the charges at issue were not pending during this time. *People v Wickham,* 200 Mich App 106, 111; 503 NW2d 701 (1993). Some of the delay after the charges were brought is attributable to defendant. On November 29, 2001, the week before trial was to start, defendant requested funds to hire experts. An adjournment was granted to enable defendant to hire a DNA expert. Trial was rescheduled for February 5, 2002. On that date, however, the prosecutor moved for an adjournment because the Michigan State Police laboratory witness, who was central to the prosecution's case, was in the hospital.[1] Witness unavailability does not weigh against either party. *Cain, supra* at 113. The delay in rescheduling trial to May 2002 is attributable to the court's scheduling and, thus, only minimally weighs against the prosecution. *Id.* The reasons for delay were warranted and were not solely attributable to the prosecution.

Further, defendant's failure to assert his speedy trial right weighs against him in determining whether there was a constitutional violation. See *Wickham, supra* at 112 (a defendant's failure to timely assert a speedy trial weighs against a finding that he was denied his right to a speedy trial).

Finally, defendant generally argues that the lengthy delay, during which he was incarcerated, was prejudicial. He speculates that, whenever there is a delay, there is the potential for witness unreliability. Further, he argues that the lengthy incarceration increased his anxiety. This Court considers both whether delay prejudiced a defendant's person and whether it prejudiced his defense. *Cain, supra* at 114. Defendant was not incarcerated solely on the instant charges until August 2001, when the parole board decided the matter of his parole violation.

[1] At the hearing on February 5, 2002, the trial court granted the prosecutor's motion, noting that defendant had the first adjournment in the case. At the hearing to adjourn, defendant agreed that his speedy trial issue was not yet ripe because the "most recent charges" for which defendant was awaiting trial were brought June 8, 2001, and the first adjournment was attributable to him.

Thereafter, at least 2-1/2 months of the delay was directly attributable to defendant's request for an expert. We conclude that the specific delays in this case did not affect defendant's person. We note that, other than his self-serving claim of heightened anxiety, the record does not support defendant's claim that he was personally prejudiced. In *Holtzer, supra* at 493, this Court found no prejudice where the defendant was incarcerated on an unrelated offense for much of the pretrial period. Moreover, the record does not establish that the defense was prejudiced. Specifically, there is no allegation, or evidentiary support for the contention, that any specific evidence or testimony became unreliable because of the length of the delay.

When balancing the four factors in this case, we find that defendant's claim of a speedy trial violation is without merit. There is no plain error requiring reversal.

VI

Defendant next raises another unpreserved allegation of error, arguing that his statements to the police should have been suppressed because they were made after he requested counsel. We review this unpreserved issue for plain error. *Carines, supra.*

Defendant first argues that his Sixth Amendment rights, US Const, Am VI, were violated when the police continued to talk to him after he requested counsel. We disagree. For Sixth Amendment purposes, the right to counsel attaches only after adversarial judicial proceedings begin. *People v Hickman*, 470 Mich 602, 603; 684 NW2d 267 (2004). Adversarial judicial proceedings commence by way of formal charge, preliminary hearing, indictment, information or arraignment. *Id.*, citing *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977). When defendant was questioned by the police after his arrest, adversarial judicial proceedings had not commenced. Thus, defendant's Sixth Amendment challenge fails.

Defendant additionally argues that his Fifth Amendment rights were violated. We disagree. A suspect in police custody must be informed that he has a right to counsel and any interrogation must cease if he requests counsel. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004), citing *Miranda v Arizona*, 384 US 436, 474; 479; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Our courts have recognized that a person may waive his once-invoked right to counsel. *People v Paintman*, 412 Mich 518, 528; 315 NW2d 418 (1982); *Harris, supra*, at 54 There must be a clear demonstration of any waiver. *Paintman, supra* at 528.

In this case, there is no question that defendant was properly informed of his *Miranda* rights after his arrest on February 3, 2000. According to Detective Christine Burnham, defendant initially requested an attorney, but he subsequently began asking the officers questions. At that point, Burnham specifically inquired whether defendant wanted to talk to the police. Defendant agreed, stating that he wanted to talk to them "now that I know what it's about, I will." Nothing in the record establishes that the police continued interrogating defendant or reinitiated interrogation after defendant requested an attorney. Rather, defendant initiated

further communications with the officers and then waived his once-invoked right to counsel. We therefore find no plain error requiring reversal. *Carines, supra.*[2]

VII

Finally, defendant argues that the trial court erred when it denied his motion to provide funds to hire an "eyewitness expert." We review a trial court's denial of a motion requesting the appointment of an expert witness for an abuse of discretion. See *People v Tanner,* 469 Mich 437, 442; 671 NW2d 728 (2003). To obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *Id* at 443.

> It is not enough for the defendant to show a mere possibility of assistance from the requested expert. "Without an indication that expert testimony would likely benefit the defense," a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Id.* (citation omitted).

Defendant failed to establish the need for an eyewitness expert based on the above considerations. The claim that Baker may have mistakenly identified the gun as the one involved in the robbery, is not the type of argument that requires expert explanation or assistance. In other words, the issue was not outside of the realm of understanding by a layperson. MRE 702.[3] Thus, defendant has not demonstrated that an "eyewitness" expert was a necessity or would have been of particular assistance to his defense. Defendant was not precluded from challenging the identification of the gun through cross-examination and argument. Further, the jury was instructed about the factors to consider when determining the credibility of witnesses and their testimony. There is no doubt that defendant could safely proceed to trial without the assistance of an "eyewitness" expert. The trial court did not abuse its discretion in refusing to provide funds for the requested expert.

In reaching our conclusion, we reject defendant's argument that Baker's identification of the recovered gun was the most significant evidence against him. Defendant confessed the crime

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[2] Defendant additionally argues that his counsel was ineffective for failing to move to suppress his statements to the police. This issue is not properly presented to this Court because it was not raised in the statement of questions presented. *People v Miller,* 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, we have reviewed the issue and find that it has no merit. Defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, there was a reasonable probability that the result of the proceeding would have been different. *Stanaway, supra* at 687-688. Because a motion based on alleged violations of defendant's Fifth and Sixth Amendment rights would have been without merit, counsel's performance did not fall below an objective standard of reasonableness. Counsel was not required to make a meritless motion. *People v Darden,* 230 Mich App 597, 604-605; 585 NW2d 27 (1998).

[3] A witness, qualified as an expert, may testify as an expert if the court determines that his specialized, scientific or technical knowledge will assist the trier of fact.

to Anderson, and there was considerable circumstantial evidence tying him to the crime. Defendant telephoned his work on the morning of the robbery and indicated that he would not be on time. Defendant's car was in the area of the robbery at the approximate time of its occurrence. A hat, like that observed on the robber, was found abandoned in the general area where the robber ran. DNA evidence connected defendant to that hat. After the robbery, defendant had his car jumped and then switched cars with his brother. He took his brother's brown Cutlass with custom white stripes. A brown car with white stripes on the hood was observed near Kenneth Jones' house on the morning of the robbery. A man approached Jones' house to retrieve something that he had previously ditched in Jones' garbage can during a police chase. Additionally, there was evidence that, after the robbery, defendant made several large purchases, and kept a significant amount of cash hidden in Brown's home where defendant lived.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Bill Schuette